Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1784

LEO BELLA and JOSEPH LICHENSTEIN,
d/b/a DAVE STREIFFER COMPANY,

Petitioner,

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provision and Statutes Involved 4

Statement of the Case 5

Reasons for Granting the Writ

A. The decision of the Court of Appeals in failing to use the substantial evidence rule conflicts with the Court of Appeals en banc decision in Malatesta v. United States and the decision of this Honorable Court in Glasser v. United States and deprives petitioners of Due Process . 11

B. The prosecutorial misconduct and its review by the Court of Appeals conflict with the decision of this Court in Berger v. United States and deprive petitioners of Due Process 15

Conclusion 18

Appendix

Page

A) Opinion of the Court of Appeals for the Fifth Circuit 21

B) Judgment of the Court of Appeals for the Fifth Circuit 70

C) Denial of Petition for Rehearing by the Court of Appeals for the Fifth Circuit 72

CITATIONS

	Page
Berger v. United States 295 U.S. 79 (1935)	3, 17
Ganett Co. v. DePasquale ____ U.S. ____, 612 L.Ed 2d 608 (1979)	17
Glasser v. United States 315 U.S. 60 (1942)	3, 11, 14, 15
United States v. Duckett 315 U.S. 60 (1942)	8, 12, 13
United States v. Malatesta 590 F.2d 1379 (5th Cir. 1979)	3, 12, 13, 15
United States v. Zicree 605 F.2d 1381 (th Cir. 1979)	8, 12, 13

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fifth Amendment to the United States Constitution	3
18 U.S.C. §1001	4, 5, 14
28 U.S.C. §371	4, 6, 14

IN THE SUPREME COURT

OF THE UNITED STATES

No.

LEO BELLA and JOSEPH LICHENSTEIN d/b/a DAVE STREIFFER COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, LEO BELLA and JOSEPH LICHENSTEIN d/b/a DAVE STREIFFER COMPANY, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on February 1, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit appears in Appendix A, infra, and is reported at ____ F.2d _____ (1980). The judgment of the Court of Appeals appears in Appendix B and the denial of the petition for a rehearing appears in Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the convictions of appellants was filed on February 1, 1980. A petition for rehearing was timely filed and thereafter denied on March 10, 1980. The Mandate of the Court was stayed to and including April 9, 1980. The stay of the Mandate will continue in effect until final disposition by the Supreme Court of the United States of this Petition for a Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have been denied Due Process under the Fifth Amendment to the United States Constitution when the sufficiency of the evidence was not reviewed under the "substantial evidence" rule of the Fifth Circuit sitting en banc in United States v. Malatesta, 590 F.2d 1379 (5th Cir., 1979) and this Honorable Court in Glasser v. United States, 315 U.S. 60 (1942).

2. Whether petitioners have been denied Due Process under the Fifth Amendment to the United States Constitution and the fundamental right to a fair trial in contravention of the teachings of Berger v. United States, 295 U.S. 78 (1935), because of prosecutorial misconduct in repeatedly referring to the

alleged smuggling of whiskey, contrary to the Court's instructions and to the offense charged.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution.

2. The statutes under which petitioners were prosecuted are 18 U.S.C. §1001 which provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

And 28 U.S.C. §371 which provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each should be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT OF THE CASE

The facts necessary to place in this setting the question now raised can be briefly stated:

A. Course of proceedings in the criminal action now before this Court.

On July 24, 1978, in the United States District Court for the Southern District of Georgia, Savannah Division, in Criminal Action No. 478-32, petitioners were found not guilty as to a violation of 18 U.S.C. §1001 and guilty as to conspiracy

to commit the same under 18 U.S.C. §371.

On November 2, 1978, the District Court entered judgment on the convictions as to the conspiracy count and petitioners were sentenced to the custody of the Attorney General for two years, but said sentence was suspended, and petitioners were placed on probation for a period of two years. The Court further directed defendants to pay a fine of $3,000 and to perform 200 hours of community services during the probationary period.

On February 1, 1980, the judgment and sentence was affirmed by the United States Court of Appeals for the Fifth Circuit in Criminal Action No. 78-5752.

On March 10, 1980, the petition for rehearing was denied and on March 24, 1980, the appellate court ordered a stay of issuance of the Mandate to and including April 9, 1980.

B. Relevant facts concerning the underlying conviction for conspiracy to make a false statement.

Defendants were charged with making, and conspiring to make a false statement on a United States Custom form 7512 by representing that 1,150 cases of Scotch whiskey were to be used for the crew of the Greek M/V Capetan Giannis whereas, allegedly, Scotch was intended to be smuggled into Brazil, South America, for future sale.

The Court of Appeals stated the following standard of review of the sufficiency of the evidence at page 2800 of the slip opinion:

> The standard of review for sufficiency of the evidence to support either the jury's verdict or the trial court's denial of defendants' motion for acquittal is the same: whether, viewing the evidence and all reasonable inferences most favorably to the prosecution, a reasonable jury could find the evidence inconsistent with all reasonable

hypotheses of the defendants' innocence. United States v. Zicree, 605 F.2d 1381, 1385 (5th Cir. 1979) (applying this standard to review of denial of motion for acquittal); United States v. Duckett, 550 F.2d 1027, 1030 (5th Cir. 1977) (applying this standard to review of jury verdict).

Petitioners contend that this standard of review was not only incorrect but was also in direct conflict with the existing en banc decision of the Fifth Circuit and the decisions of this Court.

The relevant facts as to the prosecutorial misconduct issue presented by petitioners herein primarily concern the many calculated references by the prosecution to its allegation that the whiskey was to be smuggled into Brazil.

It is uncontraverted that if the whiskey was not to be used as vessel supplies, it nevertheless would have no monetary effect on any government agency. It was shown only that if the whiskey had

been listed as a part of the cargo, then it would have been necessary to complete a Bureau of Census form and the failure to do this, apparently created the capacity to deceive a government agency. Because of this de minimus effect of the allegedly false statement, the prosecution attempted to make this a case of smuggling. It constantly suggested the crime of sumggling from the beginning of the prosecution to the closing argument. The indictment alleged the cargo was not to be used as vessel supplies but was destined to be smuggled into Brazil (R. 6). The prosecutor lost no time in getting in the smuggling in the opening statement (T. 12-13). Reference was made to the export control laws (T. 33, 34), and the objections of petitioners that they were not being tried on smuggling charges was sustained, (T. 34). The prosecution again made indirect reference to smuggling

by referring to the vessel as a "tramp ship" which was objected to as being highly prejudicial (T. 54). The government next characterized the whiskey as contraband (T. 75). Both the reference to the tramp ship and the contraband liquor was utterly without foundation but bolstered the atmosphere of smuggling, which the prosecution needed to create to shore up his otherwise de minimus case.

Petitioners were forced to object to the reference to smuggling when the prosecution argued in front of the jury to the court that the prosecution wished to show the probability of smuggling in Brazil (T. 104). References by the prosecution or its witnesses to smuggling was made on more occasions (T. 176).

In the closing argument the prosecution quit using the word smuggle but substituted the word "illegal" stating

"it was intended to go somewhere in South America in an illegal manner, that is really the heart of the case" (T. 370). Indirect references to smuggling again were made at T. 408. All in all, it was necessary for petitioners to object six times to references made by the prosecution to illegal importation, and petitioners moved for a mistrial on several occasions because of these remarks.

REASONS FOR GRANTING THE WRIT

A. The panel of the Fifth Circuit which upheld the conviction in the instant action did not follow the en banc decision of its circuit on the substantial evidence rule, and the decision further is in conflict with a decision of this Court in Glasser v. United States, 315 U.S. 60 (1942).

The instant action was not considered by the Fifth Circuit until the fall

of 1979. Yet, some months earlier, in March, the Fifth Circuit, sitting en banc, held in United States v. Malatesta, 590 F.2d 1379 at 1382 (5th Cir. 1979):

> We are convinced that when the sufficiency of the evidence to support any criminal conviction, including conspiracies, is challenged on appeal the correct standard of review is substantial evidence, it being understood, of course, that the evidence is to be viewed in the light most favorable to the government.
>
> The 'slight evidence' rule as used and applied on appeal in conspiracy cases since 1969 should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly banished as to all appeals hereafter to be decided by the Court.

The Malatesta decision was pointed out to the panel by petitioners in their brief; nevertheless in spite of the rather strong language of Malatesta, the Court of Appeals chose only to cite United States v. Zicree, 605 F.2d 1381, 1385 (5th Cir., 1979) and United States v.

Duckett, 550 F.2d 1027, 1030 (5th Cir., 1977). Neither case was an en banc decision, and neither decision makes any reference to the substantial evidence rule. Zicree correctly enunciates the "reasonable hypotheses" rule but never mentions "substantial" or "slight" evidence. Duckett employed the "slight evidence rule".

Moreover, the Court's opinion never uses the word "substantial" and petitioners can only assume that their arguments and the evidence in support of their arguments were analyzed under the "slight" rather than the substantial evidence rule. The Court of Appeals was again asked to consider Malatesta in the petition for rehearing of defendants but the petition was denied without opinion.

The panel upholding the convictions in this action is bound to follow its en banc decision of the Fifth Circuit and

petitioners are entitled to have the sufficiency of the evidence reviewed under the substantial evidence rule rather than the slight evidence rule. The entire thrust of the arguments of appellants on the issues of falsity, materiality and specific intent was done with a view toward the substantial evidence rule. In addition, this is a case of first impression in that it is the first prosecution under 18 U.S.C. §1001 and 18 U.S.C. §371 for a listing of cargo as vessel supplies on a customs form, and before the careers of the petitioners are ruined by felony convictions, this action should be remanded to the Court of Appeals with direction that the proper standard of review be given to the review of the sufficiency of the evidence.

The decision is also in conflict with the decision of this Court in Glasser v. United States, 315 U.S. 60 (1942).

Malatesta observed at 1382,

> Nearly forty years ago, in Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 87 L.Ed. 680 (1942) the Supreme Court said that the verdict of a jury is to be sustained 'if there is substantial evidence, taking the view most favorable to the government, to support it' (emphasis added).

B. The prosecutorial misconduct, rendered the trial so fundamentally unfair that petitioners were denied Due Process under the Fifth Amendment to the United States Constitution.

The Fifth Circuit condemned the "prosecutorial attempts to influence the jury improperly by reference to more flamboyant but extrinsic and unproved activities of petitioners." Yet it held, in effect, that this was permissible "in light of the relatively strong evidence of guilt and deliberate misrepresentation in this case, coupled with the court's

curative instructions, . . . " The Court seems to be saying that where the prosecution in its opinion has (1) presented a strong case and the Court has (2) issued curative instructions, the prosecution may be as improper as it wishes. Petitioners respectfully disagree with this. Whether the case presented by the prosecution is strong or weak should have no relevance whatsoever to the fairness of the trial to be afforded petitioners. Moreover, one can only speculate as to whether the instructions were curative. Every criminal defendant is to be afforded a fair and impartial trial and this Court should condemn any action which encourages the prosecution to break the rules simply because they may have a "strong case" and where the Court enunciates magic words to the jury which no one really knows was "curative."

This Court's landmark decision in

Berger v. United States, 295 U.S. 78, at 88 (1935) clearly sets forth the standard of professional responsibility for all prosecutors to follow; the prosecutor is a "representative not of an ordinary party to a controversy, but of a sovereignity . . . whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger was cited with approval by this Court recently in Ganett Co. v. De Pasquale, ____U.S.____, 61 L.Ed.2d 608, at 824 (1979). Yet, the prosecution deliberately set upon a course of prejudice by repeatedly communicating to the jury a word that each and every juror understood --"sumggling"--rather than confining itself within the parameters of the crime as charged--making a false statement on a customs form. The prosecution knew that this was not such a charge that the jury would understand or be in sympathy with.

CONCLUSION

The ruling panel in the Fifth Circuit in this action departed from the en banc decision of its circuit in not using the substantial evidence rule for review of the sufficiency of the evidence after having been reminded of the rule in the brief of petitioners and the petition for rehearing of the petitioners. The substantial evidence rule is critical to the defense and petitioners should not be convicted of a felony and have their licenses to engage in business be revoked without a review of the sufficiency of the evidence against them under the substantial evidence rule.

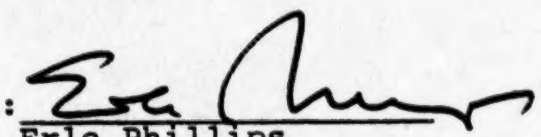
The deliberate prosecutorial misconduct to make the action one for smuggling rather than making a false statement on a government form, has been effectively condoned by the Fifth Circuit which held that where the prosecution has a strong

case and the Court issues the "curative" instructions to the jury, then prosecutorial attempts to influence the jury improperly are permissible. This ruling has far-reaching implications and dire consequences to all petitioners seeking the Constitutional protection of merely having a fair trial. The right of these petitioners to Due Process is denied when the Court is not required to abide by its own rules of substantial evidence and when the prosecution is not required to abide by its own standards of conduct so carefully and painstakingly enunciated by this Court long ago.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FISHER & PHILLIPS

By: 
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UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph LICHENSTEIN and Leo Bella,
Defendants-Appellants.

No. 78-5752.

United States Court of Appeals,
Fifth Circuit.

Feb. 1, 1980.

Defendants were convicted before the United States District Court for the Southern District of Georgia, at Savannah, Anthony A. Alaimo, Chief Judge, of conspring to knowingly and willfully submit false statement to government agency by falsely designating as "vessel supplies" 1,150 cases of bonded scotch whiskey on United States Customs form, and they appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) evidence was sufficient for jury on issue of defendants' specific intent; (2) falsification about which defendants conspired was

correctly found to be material; (3) conspiracy convictions were not vitiated by not guilty verdicts on substantive counts; (4) defendants were not so misled by Customs' practice as to preclude prosecution for their deliberate misrepresentation; (5) defendants failed to prove that they were victims of selective prosecution; and (6) cumulative effect of prosecutor's references to "smuggling" of whiskey into Brazil did not require a new trial.

Affirmed.

1. Criminal Law--1158(2), 1159.2(8)

Standard of review for sufficiency of the evidence to support either jury's verdict or trial court's denial of defendants' motion for acquittal are the same, that is, whether viewing evidence and all reasonable inferences most favorably to the prosecution, a reasonable jury could find evidence inconsistent with all reasonable hypotheses of defendants' innocence.

2. Conspiracy--23

To sustain conspiracy conviction there must be proof of agreement among two or more persons to accomplish something that constitutes offense against the United States, and an overt act by one of them in furtherance of conspiracy.

3. Conspiracy--40.1

As to each conspirator, prosecution must show existence of conspiracy and that accused knowingly participated in it.

4. Fraud--68.10(2)

Offense of knowingly and willfully submitting false statement to government agency consists of a statement that is false and material, made with requisite specific intent, within purview of government agency jurisdiction. 18 U.S.C.A. §1001.

5. Fraud--68.10(2)

Statute prohibiting knowingly and willfully submitting false statement to

government agency proscribes only deliberate, knowing, willful false statements; statement must have been made with intent to deceive, a design to induce belief in falsity or to mislead, but statute does not require an intent to defraud. 18 U.S.C.A. §1001.

6. Conspiracy--28(3)

To sustain conviction of conspiracy to violate statute prohibiting knowingly and willfully submitting false statement to government agency, Government must prove at least same degree of criminal intent as is required for substantive offense, namely, that statement was made with intent to deceive, a design to induce belief in falsity, or to mislead. 18 U.S.C.A. §1001.

7. Conspiracy--48.1(3)

Fraud--69(6)

In prosecution charging defendants with knowingly and willfully submitting

false statement to government agency by falsely designating as "vessel supplies" 1,150 cases of bonded scotch whiskey on United States Customs form and with conspiring to accomplish the same, evidence, including inference that 25-man crew on 14-day voyage could not ingest 1,150 cases of scotch, was sufficient for jury on issue of specific intent of defendants, who clearly intended to manipulate and pervert Customs' functioning by means of their falsification and whose falsified forms did in fact carry a capacity to deceive. 18 U.S.C.A. §§371, 1001.

8. Fraud--68.10(2)

Material false statement, for purposes of statute prohibiting knowingly and willfully submitting false statement to government agency, is one that is capable of affecting or influencing exercise of government function and fact that Government is not actually

influenced by statement is immaterial; furthermore, potential effect on Government need not involve pecuniary loss but, rather, false statement must simply have capacity to impair or pervert functioning of governmental agency. 18 U.S.C.A. §1001.

9. Fraud--68.10(4)

Materiality of false statement submitted to government agency rests upon factual evidentiary showing by prosecution but determination is question of law for court and is therefore subject to complete review, unrestricted by "clearly erroneous" standard. 18 U.S.C.A. §1001.

10. Fraud--68.10(4)

Where falsification of nature of bonded whiskey as "vessel supplies" did have capacity to impair functions of United States Customs in achieving an accurate declaration of exported cargo, and through them the Bureau of Census,

defendants' false designation of whiskey as vessel supplies, with respect to which defendants were convicted of conspiracy, was correctly found to constitute material false statement under statute prohibiting knowingly and willfully submitting false statement to a government agency. 18 U.S.C.A. §371, 1001.

11. Criminal Law--1159.1

A court may not divine from general verdict of acquittal specific findings since such a parsing of hypothesized jury reasoning is an incursion contrary to sanctity accorded jury verdicts; rather, juries in criminal cases are free to render verdicts that are inconsistent or even result of mistake or compromise.

12. Criminal Law--878(4)

Any apparent inconsistency between jury's acquittal of defendants on substantive counts of knowingly and willfully submitting false statement to govern-

ment agency and defendants' conviction of conspiracy to accomplish same, in light of defendants' admission that they made false statement proscribed by statute, did not undermine their conspiracy convictions. 18 U.S.C.A. §§371, 1001.

13. Criminal Law--878(4)

Rule that one may not be convicted and sentenced on logically contradictory charges does not bear upon rule upholding adequately supported conviction despite apparent inconsistency in findings of guilty and not guilty on different counts of two-count indictment, in light of deference accorded jury to return verdicts based, for instance, on compromise.

14. Fraud--68.10(3)

Defendants, who relied simply on United States Customs' past inactivity in failing to object or to prosecute for abuse of "reasonable quantities" limitation on vessel supplies and on widespread

exploitation of inactivity by shippers, who did not show that alleged policy had been expressly articulated to them, and who presented no evidence that Customs ever acquiesced in misrepresentation of vessel supplies when characterization was actually known to be false, were not so misled by Customs as to preclude their prosecution for their deliberate misrepresentation concerning "vessel supplies." 18 U.S.C.A. §§371, 1001.

15. Constitutional Law--250.1(3)

Though selective prosecution, if based on improper motives, can violate constitutional guarantees of equal protection, selective enforcement in and of itself is not a constitutional violation, and thus to support defense of selective prosecution, one must establish that others similarly situated have not generally been prosecuted and that government's discriminatory selection of him is

invidious or in bad faith, that is, based on constitutionally impermissible consideration such as race or religion. U.S.C.A. Const. Amend. 5

16. Criminal Law--569

Where defendants showed that third party was willing to participate in sale of scotch whiskey but did not adduce evidence to show that he was willing to participate in misrepresentation, and Government simply had not been able to locate ship captain, who was alleged to be instigator of entire scheme, in United States territory since incident, defendants, who were convicted of conspiring to knowingly and willfully submit false statement to government agency by falsely designating as "vessel supplies" 1,150 cases of bonded scotch whiskey on United States Customs form, failed to prove first prong of selective prosecution test. 18 U.S.C.A. §§371, 1001.

17. Criminal Law--730(1), 919(2, 3)

To warrant new trial, prosecutorial misconduct in form of improper comment or questioning must be so pronounced and persistent that it permeated entire atmosphere of trial; moreover, while each case must be judged on its own facts, prejudicial comment may be rendered harmless by curative instructions to jury.

18. Criminal Law--919(3)

Although prosecutorial attempt to influence jury improperly by reference to more flamboyant but extrinsic and unproved activities of defendants are to be condemned, cumulative effect of a few comments by prosecutor referring to "smuggling" of whiskey into Brazil over course of three-day trial did not require a new trial on charge of conspring to knowingly and willfully sub-

mit false statement to government agency by falsely designating as "vessel supplies" 1,150 cases of bonded scotch whiskey on United States Customs form in light of strong evidence of guilt, coupled with court's curative instructions. 18 U.S.C.A. §§371, 1001.

Appeal from the United States District Court for the Southern District of Georgia.

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

Appellants Bella and Lichenstein were charged with knowingly and willfully submitting a false statement to a government agency, 18 U.S.C. §1001, by falsely designating as "vessel supplies" 1,150 cases of bonded scotch whiskey on a United States Customs form, and with

conspiring to accomplish the same, 18 U.S.C. §371. At trial the jury returned verdicts acquitting both men on the conspiracy count. Appellants challenge their convictions on a variety of grounds: (1) that there was insufficient evidence either to avert defense motions for judgments of acquittal or to support the jury verdict; (2) that the trial judge erred in finding the falsification to be "material"; (3) that the inconsistency of the jury verdicts requires reversal; (4) that the longstanding practice of Customs in allowing without question the lading of similarly large consignments of whiskey and other goods as vessel supplies actively misled appellants regarding the criminality of falsely designating goods as vessel supplies; (5) that they were selectively prose-

cuted; and (6) that the prosecutor irreparably tainted the trial with recurrent references to extrinsic "smuggling" activities. We affirm the convictions.

Leo Bella, president of Ambrasco International Export Corporation of New York, primarily engages in the brokerage and exportation of machinery to South America. In September 1975 Bella arranged with Joseph Lichenstein, president of the Dave Streiffer Company--a ship chandler, a dealer in vessel supplies--to have 900 cases of scotch whiskey, purchased by Bella in Switzerland, imported under Streiffer Company's name and stored in the latter's bonded warehouse in New Orleans. In November 1975 Bella telephoned Lichenstein again to arrange the transfer of these 900 cases, plus an additional 250 cases to be purchased for Streiffer stock to the port of Savannah, Georgia, to be laden aboard

the Greek freighter CAPETAN GIANNIS. Bella inquired whether the whiskey might be transported and laden as "vessel supplies" (items to be consumed on board ship) rather than export cargo; Lichenstein assured him that it could be so designated even though both men knew the GIANNIS to be bound only for a fourteen-day voyage to Brazil with a crew of twenty-five.

In order to obtain release of the bonded whiskey from the Streiffer warehouse for transit to another United States port, Lichenstein was required to submit to Customs several prescribed forms 7512, indicating the eventual destination of the whiskey to be vessel supplies to be laden aboard the GIANNIS in Savannah, the quantities to be withdrawn, and the mode of transit to

Savannah.[1] A Customs Warehouse Officer, Oscar H. Staines, stationed at Streiffer's bonded warehouse then released the whiskey according to these forms, and it was transported to Savannah via common carrier in sealed trailers. A Customs inspector in Savannah then validated the forms 7512 on November 18, 1975, to

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[1]Bonded goods, such as the 900 cases imported by Bella and the other stores in the Streiffer warehouse, are goods that come into port in this country only to be shipped elsewhere, rather than being distributed or consumed in the United States. Accordingly, such goods are exempt from United States import duties. Because of the potential revenue loss from any abuse of this exemption, bonded goods are subject to careful, constant supervision by Customs to prevent their being funnelled, untaxed, into domestic trade. Upon entry they must be stored in a bonded warehouse, such as Streiffer's, licensed by the government and regulated by Customs. Customs must also oversee any movement of the goods, either for lading directly aboard a ship for export or transportation to another port for eventual export. No taxes are paid upon the export of such goods either as vessel supplies or as manifested cargo.

acknowledge that the whiskey had arrived satisfactorily and had not been diverted into domestic trade. Upon noticing the excessive quantity being laden as vessel supplies, however, he notified two other Customs special agents. These agents breifly questioned the captain of the GIANNIS about the intended lading of 1,150 cases of scotch as vessel supplies, and thereafter decided to question Bella in New York. For reasons not made clear at trial, the captain subsequently refused to have the suspect whiskey laden aboard, and the GIANNIS departed from Savannah later that same evening, November 18, before Customs' interviews with Bella could be completed. After speaking with Bella and Lichenstein, Customs seized the whiskey on November 20, 1975, and the indictments for false statements and conspiracy followed.

I.

[1] The standard of review for sufficiency of the evidence to support either the jury's verdict or the trial court's denial of defendants' motion for acquittal is the same: whether, viewing the evidence and all reasonable inferences most favorably to the prosecution, a reasonable jury could find the evidence inconsistent with all reasonable hypotheses of the defendants' innocence. United States v. Zicree, 605 F.2d 1381, 1385 (5th Cir. 1979) (applying this standard to review of denial of motion for acquittal); United States v. Duckett, 550 F.2d 1027, 1030 (5th Cir. 1977) (applying this standard to review of jury verdict).

[2, 3] To sustain a conspiracy conviction there must be proof (1) of an agreement among two or more persons

(2) to accomplish something that constitutes an offense against the United States, and (3) an overt act by one of them in furtherance of the conspiracy. United States v. White, 569 F.2d 263, 266 (5th Cir.), cert. denied, 439 U.S. 848, 99 S.Ct. 148, 55 L.Ed. 2d 149 (1978). As to each conspirator, the prosecution must show the existence of a conspiracy and that the accused knowingly participated in it. United States v. Barrera, 547 F.2d 1250, 1256 (5th Cir. 1977). There is little controversy that the required proof was given for the majority of these elements. Direct evidence, predominantly admissions by Bella and Lichenstein themselves, that Bella requested Lichenstein to withdraw the 1,150 cases of whiskey from his bonded warehouse as "vessel supplies" to be laden aboard

the GIANNIS under this label, that Lichenstein responded to this inquiry that it would be "no problem," and that, accordingly, he had the whiskey removed from his warehouse and shipped to Savannah pursuant to Customs forms 7512 that he had caused to be executed falsely, designating the whiskey as vessel supplies as per Bella's request, amply demonstrates an agreement and knowing participation by both parties, as well as a key overt act in furtherance of the conspiracy (execution of the Customs forms).

[4] Appellants, however, contend there was insufficient proof of any unlawful purpose of their agreement--that is, they argue that their goal of representing the whiskey to Customs as "vessel supplies" would not, in the context of this case, consitute a viola-

tion of 18 U.S.C. §1001. The elements of an offense under §1001 are (1) a statement, that is (2) false (3) and material, (4) made with the requisite specific intent, (5) within the purview of government agency jurisdiction. United States v. Lange, 528 F.2d 1280, 1287 (5th Cir. 1976). Aside from the finding of materiality, a question of law examined below, appellants seriously controvert only the proof of specific intent.

[5-7] Section 1001 proscribes only deliberate, knowing, willful false statements. Lange, 528 F.2d at 1288. The statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but §1001 does not require an intent to defraud--that is, the intent to deprive someone of something by means of

deceit. United States v. Godwin, 566 F.2d 975, 976 (5th Cir. 1978) (per curiam). To sustain the conviction of conspiracy to violate §1001, the government must have proved at least this same degree of criminal intent as required for the substantive offense. United States v. Feola, 420 U.S. 671, 686, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); United States v. Wieschenberg, 604 F.2d 326, 331 (5th Cir. 1979) (requiring proof of specific intent to sustain conviction of conspiracy to commit a specific intent crime). In a sworn statement given to a Customs agent and entered at trial (Gov't exh. no. 17), appellant Bella admitted that the whiskey "had to be invoiced as ship stores" in order to avoid its being entered on the export manifest "because there was no Brazilian import license available." Lichenstein admitted having stated in conversation

with this same agent that he "didn't believe the crew would drink that much whiskey" and that "the whiskey was going into South America" (Supp.R. at 186-87, 356). These acknowledgements by appellants, coupled with the common sense inference that a twenty-five men crew on a fourteen-day voyage could not ingest 1,150 cases of scotch, adequately demonstrate the falsity of the designation of these goods as "vessel supplies" and appellants' knowledge of that falsity. Moreover, appellants deliberately made these misrepresentations, perhaps, as Bella's statement suggests, to facilitate unlading of the whiskey in South America.

Appellants creatively contend, however, that they made their knowing falsification with no intent to deceive. Rather, they claim, they acted in reliance on a longstanding practice of

Customs to accept, unquestioningly, excessive quantities of goods as vessel supplies. Customs is charged with enforcing 15 C.F.R. §371.9, a regulation that restricts the lading on board ships of goods as "ship stores" or vessel supplies to "reasonable quantities." Appellants adduced uncontroverted evidence that Customs had traditionally construed this provision very liberally, illustrating this by several transactions in which appellants, themselves, had been involved.[2] In addition, appellants introduced evidence of an intra-agency

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[2]For example, Lichenstein presented invoices (Def. exh. nos. 3, 4), showing that in 1973 his company had loaded 700,000 cigarettes and 1,150 cases of scotch aboard one vessel, and Lichenstein testified he had encountered no resistance from Customs to designating this as ship stores. Similarly, Bella re recounted having arranged a sale as vessel supplies of 500 cases of whiskey to an Argentine warship.

communication between Customs Warehouse Officer Staines, stationed at the Streiffer warehouse, and his superiors to the effect that no limits were to be enforced on the quantities of whiskey allowed to be designated as vessel supplies (Def. exh. no. 7). In this context appellants argue that they had no intent to deceive Customs, but were simply acting in conformity with past practice. Their characterization of 1,150 cases of whiskey as vessel supplies for so few men for such a short voyage was, they argue, inherently unbelievable, incapable of deceiving anyone, and simply further proof of the fact that they never intended for Customs actually to believe the designation, so long as Customs treated this whiskey in the same way it had treated past consignments. In essence, appellants contend that they

had no intent to "deceive," under the Godwin definition of that term as a design to mislead or to cause to believe falsely, because Customs' past practice indicated that it traditionally placed on reliance on and formed no belief as to the truth of any designation as vessel supplies, but merely accepted such designations and acted ministerially according to them.

We do not believe the concept of intent to deceive under §1001 may be so narrowly or literally drawn. It is undisputed that by falsely characterizing the whiskey as vessel supplies, appellants would have circumvented the Customs requirement that all goods exported, other than vessel supplies, be the subject of an export declaration (an additional Customs and Bureau of Census form) and that such goods be entered on

the ship's outward manifest, a list available to Customs inspectors of other ports and countries of all cargo on board, save ship stores. Bella's statement indicating the absence of import licenses in Brazil to be the reason the whiskey had to be laden as ship stores (undeclared on the GIANNIS's outward manifest) suggests the avoidance of these formal requirements to have been the prime motivation behind the falsification of the Customs forms. Thus, whether or not appellants intended to deceive Customs in a subjective or literal sense, they clearly intended to manipulate and pervert its functioning by means of their falsification. We believe that it was just this type of intent, to disrupt agency functions by false statements, that §1001 was designed to proscribe. Cf. United States

Goldfine, 538 F.2d 815, 820 (9th Cir. 1976) (stating the capacity of a false statement to impair the functions of an agency to be the hallmark of materiality bringing the statement within the proscription of §1001).

Moreover, even under appellants' theory, subjective deceit arguably was also shown. Large quantities are not always obviously inconsistent with the supplies being ship stores. Testimony of several witnesses indicated that quantities that would be excessive for one ship's supplies would be allowed where that ship was procuring for a group of ships, for instance a merchant or military fleet. Customs Warehouse Officer Staines testified that he knew nothing about the size of the GIANNIS, moored at Savannah, or the nature of its procurement of supplies when he re-

leased the whiskey in New Orleans. One might infer that he relied for the determination of the propriety of the procurement on the Customs officials in Savannah where the goods actually were to be laden aboard the GIANNIS. Staines asserted, however, that had he known the whiskey was not to be used as vessel supplies he would not even have released them for transportation to Savannah as such. Therefore, the falsified forms 7512 submitted to Staines by Lichenstein did, in fact, carry a capacity to deceive.

Accordingly, we find sufficient evidence of specific intent, as well as of the other elements enumerated above, to support the trial court's denial of the motions for acquittal and the jury's verdict.

II.

[8, 9] In addition to attacking

the jury verdict, appellants challenge the trial court's finding, as a matter of law, that the falsification about which they conspired was a material false statement under §1001. While materiality is not an explicit requirement of the second, false statements, clause of §1001, courts have inferred a judge-made limitation of materiality in order to exclude trifles from its coverage. United States v. Beer, 518 F.2d 168, 171 (5th Cir. 1975). A material false statement under this rule is one that is capable of affecting or influencing the exercise of a government function. United States v. Goldfine, 538 F.2d 815, 820 (9th Cir. 1976); United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975). That, as here, the government is not actually influenced by the statement is immaterial. Gold-

fine, 538 F.2d at 820-21. Accord, Beer, 518 F.2d at 172 (dictum). The potential effect on the government need no involve pecuniary loss. United States v. Gilliland, 312 U.S. 86, 93, 61 S.Ct. 518, 85 L.Ed. 598 (1941); United States v. Krause, 507 F.2d 113, 117 (5th Cir. 1975). The false statement must simply have the capacity to impair or pervert the functioning of a governmental agency. Krause, 507 F.2d at 117-18; United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974) (en banc). Materiality rests upon a factual evidentiary showing by the prosecution. Beer, 518 F.2d at 172. The determination is, however, a question of law for the court, Krause, 507 F.2d at 118, and therefore subject to complete review, unrestricted by the "clearly erroneous" standard. See Kaspar Wire Works, Inc. v. Leco Engineering & Machine Co., 575 F.2d 530, 533

n. 1 (5th Cir. 1978).

[10] Appellants' false designation of the whiskey as vessel supplies obviously foreclosed its proper designation on the proper export declaration forms as being laden for export. This would have had no tax or other pecuniary effect on the government. However, had it gone undetected, the falsification and avoidance of the export declaration would have allowed evasion of the requirement that goods actually being laden as export cargo be listed on the ship's outward manifest--an indication to Customs officials in other countries and other United States ports of the presence on board of the bonded, untaxed whiskey. Moreover, by precluding Customs from accurately recording this whiskey as export goods, appellants prevented them from furnishing to the

Bureau of Census, as is their duty, information needed to compile import-export statistics. Pervasive falsifications of this nature obviously would totally pervert these statistics and undermine the efforts of Customs and Census officials assigned to collect the data. This case is therefore unlike Beer, the case relied upon by appellants, since in that case the government failed to demonstrate any potential adverse effect of the false statement. Thus, falsification of the nature of the whiskey as vessel supplies did have the capacity to impair the functions of Customs, in achieving an accurate declaration of exported cargo, and, through them, the Bureau of Census. The trial judge was, therefore, correct in finding the statement to be material.

III.

Appellants next argue that the jury verdicts acquitting them of the substantive count, but convicting them of conspiracy were so inconsistent as to require reversal. While acknowledging that ordinarily a verdict of guilty on conspiracy may not be inconsistent with acquittal on the substantive offense, United States v. Dearden, 546 F.2d 622, 624 (5th Cir. 1977), appellants argue that since in this case they admitted making the false statement proscribed by §1001, the jury's acquittal on that count must indicate either a finding that there was no specific intent or that the statement was not false. In either case, they contend the verdict indicates that the object of their conspiracy was not a crime, so the conspiracy was not, itself, illegal.

[11, 12] This argument is without merit. A court may not divine from a general verdict of acquittal such specific findings; such a parsing of hypothesized jury reasoning is an incursion contrary to the sanctity accorded jury verdicts in our criminal system. See generally, United States v. D'Angelo, 598 F.2d 1002 (5th Cir. 1979). Juries in criminal cases in this country are free to render verdicts that are inconsistent or even the result of mistake or compromise. Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 3546 (1932); United States v. Dudley, 581 F.2d 1193, 1199 (5th Cir. 1978). Thus, any apparent inconsistency between verdicts on the two counts of the indictment does not undermine convictions on the conspiracy count on which appellants were found guilty. "Each count

is separately considered and, if it is supported by the evidence, may stand." United States v. Romeros, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam; upholding conspiracy conviction over appellant's argument that acquittal on substantive count constituted a jury finding that the object of the conspiracy was not a federal crime).

[13] The decision in Marquez-Anaya v. United States, 319 F.2d 610 (th Cir. 1963) (per curiam), relied upon by appellants, is not contrary to this rule. There this court overturned a conviction on one count (accepting narcotics in this country without paying a transfer tax) of a three-count indictment where it determined that convictions on the other two counts (smuggling the narcotics into the country) logically excluded conviction

on the first. In that situation the court merely determined that sufficient evidence existed to support the verdicts on the smuggling counts and affirmed those convictions. Accord, Thomas v. United States, 314 F.2d 936, 939 (5th Cir.), cert. denied, 375 U.S. 849, 84 S.Ct. 105, 11 L.Ed.2d 76 (1963). The rule in these cases, that one may not be convicted and sentenced on logically contradictory charges, does not bear upon the Dunn rule upholding an adequately supported conviction despite apparent inconsistency in the findings of guilty and not guilty on different counts of a two-count indictment--particularly in light of the deference accorded juries to return verdicts based, for instance, on compromise. Glenn v. United States, 137 U.S. App. D.C. 120, 420 F.2d 1323 (D.C. Cir.

1969), another case relied upon by appellants, involving an ambiguous single verdict, is also inapposite here. Therefore, the jury's verdict on the conspiracy count having been held in Section I, above, to have been adequately supported by the evidence, we hold the convictions on that count not to be vitiated by the not guilty verdict on the substantive count.

VI.

[14] Aside from its bearing on mens rea, appellants contend that the longstanding Customs practice of allowing the shipment of excessive quantities of goods characterized as ship stores or vessel supplies should in its own right bar this prosecution. Appellants maintain that, particularly with reference to the transactions in which they were involved, by pursuing this practice Customs actively misled them to believe

there would be no punishment for misrepresenting cargo as vessel supplies despite the law and regulations to the contrary. For this they rely on United States v. Laub, 385 U.S. 475, 487, 87 S.Ct. 574, 17 L.Ed.2d 526 (1967) and Raley v. Ohio, 360 U.S. 423, 438, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), both of which held that the government may not prosecute for the commission of an act about the criminality of which it has "actively misled" defendants or issued "inexplicably contradictory commands."

The Court in both Raley and Laub, was, however, addressing circumstances where some authoritative voice in the government had issued official, express assurances that no criminal sanctions would attach to the acts in question. A case much closer to this one is United States v. Pennsylvania Industrial Chemi-

cal Corporation, 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973). There the Supreme Court remanded under Raley-Laub to allow the defendant to show that it had relied in good faith on a longstanding policy of the government agency charged with enforcement of the statute involved not to apply its sanctions to the particular activity engaged in by defendant--notwithstanding the activity's being literally comprehended by the terms of the statute. Even there, however, the agency had issued public regulations, upon which defendant allegedly had relied, expressly circumscribing its enforcement of the statute involved.

Here appellants rely simply on Customs' past inactivity in failing to object or to prosecute for abuse of the "reasonable quantities" limitation on vessel supplies and on widespread exploitation of that inactivity by shippers.

While appellants suggest that they had in the past received some affirmative indications that no limits would be enforced, none were proved at trial. There was introduced evidence of an intra-agency communication to Customs Warehouse Officer Staines (Def. exh. no. 7), indicating he was to impose no limit on the quantity of liquor, but there was no proof that this policy had been expressly articulated to Lichenstein or Bella. More importantly, the question of quantities aside, there was no evidence that Customs even acquiesced in the misrepresentation of vessel supplies when the characterization was actually known to be false; thus a posture of total indifference may not even be suggested. "[G]overmental silence is not 'affirmative assurance that punishment will not attach' and a mere absence of prior pro-

secutions does not constitute 'active misleading'" even in the fact of widespread practice of the proscribed activity. United States v. Mann, 517 F.2d 259, 270 (5th Cir. 1975), cert. denied, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976). In Mann this court refused to apply the Raley-Laub rule to a situation of past governmental acquiesence in widespread illegal bank loan activity even though regular bank examinations had failed to alert the bank that the practice was a violation of the law and despite evidence of intra-agency government memoranda indicating that those engaged in the proscribed activity should not be prosecuted. Id. at 269-70. See also United States v. Clark, 546 F.2d 1130, 1135 (5th Cir. 1977) (denying application of Raley-Laub to a false statements case). Accordingly, we hold that appellants were not so misled by

Customs as to preclude prosecution for their deliberate misrepresentation.

V.

Appellants also contend they were the victims of selective prosecution. They argue that even though a Savannah ship chandler, Bruce P. Ford, had agreed with them to sell 150 cases of scotch to be added to appellants' 1,150 cases for lading aboard the GIANNIS, he was not indicted for conspiracy.

[15, 16] Though selective prosecution, if based on improper motives, can violate constitutional guarantees of equal protection,[3] selective enforcement in and of itself is not a constitutional violation. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d

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[3] Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed 884 (1954) (incorporating equal protection guarantees into the fifth amendment due process clause).

446 (1962). Therefore, to support a defense of selective prosecution one must establish (1) that others similarly situated have not generally been prosecuted and (2) that the government's discriminatory selection of him is invidious, or in bad faith--that is, based on constitutionally impermissible considerations, such as race or religion. United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978).[4] Here appellants showed that Ford was willing to participate in the sale of the scotch. They did not, however, adduce evidence to show that he was willing to participate in the misrepresentation. In fact, the forms 7512

[4] This heavy burden imposed upon defendants is indicative of the policy of restraint that derives from a respect for executive, prosecutorial discretion implicit in constitutional separation of powers. United States v. Hayes, 589 F.2d 811, 819 n.3 (5th Cir. 1979).

on which the original falsification had occurred were executed in New Orleans before Ford's potential participation began. This, coupled with the decision of the captain of the GIANNIS not to buy Ford's whiskey, effectively deprived him of any opportunity ever to participate in any falsification. Appellants also contend that the captain of the GIANNIS, alleged to be the instigator of the entire scheme, should have been prosecuted as well, but there was ample indication at trial that, all else aside, the government simply had not been able to locate the captain in United States territory since the incident. Thus, appellants have not borne their burden of proving even the first prong of the test, selectivity, much less the invidiousness of any selectivity.

VI.

Finally, appellants contend that the prosecutor so tainted the proceedings below by repeatedly referring to the "smuggling" of the whiskey into Brazil, what she believed to be the intended goal of appellants, that a new trial must be awarded. On at least seven occasions defense counsel objected to prosecution references to "smuggling" or illegal import into Brazil, three times unsuccessfully moving for a mistrial. On each occasion the trial judge sustained the objections and cautioned the jury to disregard references to smuggling, twice he gave curative instructions to the effect that smuggling or importing into Brazil was not an offense against the United States, and that they jury should completely disregard any references to such activity.

[17] To warrant a new trial prosecutorial misconduct in the form of improper comment or questioning "must be so pronounced and persistent that it permeates the entire atmosphere of the trial." United States v. Blevins, 555 F.2d 1236, 1240 (5th Cir. 1977), cert. denied, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978). Moreover, while each case must be judged on its own facts, prejudicical comment, such as the references here to possible extrinsic effects or violations, may be rendered harmless by curative instructions to the jury. See, e.g., United States v. Cook, 586 F.2d 572, 578 (5th Cir. 1978), cert. denied, ___ U.S. _____, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979) (Comments regarding endangering military personnel as a result of defendant's fraud held cured by instruction); United States v.

Mikka, 586 F.2d 152, 155-56 (9th Cir. 1978), cert. denied, 440 U.S. 921, 99 S.Ct. 1247, 59 L.Ed.2d 474 (1979) (prosecution's suggestion that convicted felon possessed firearm to commit more crimes held cured by admonition). But see, e.g., United States v. Herberman, 583, F.2d 222, 230-31 (5th Cir. 1978) (prosecution held to have made too many improper suggestions and to have introduced too much improper evidence to be cured by instruction).

[18] This court condemns prosecutorial attempts to influence a jury improperly by reference to more flamboyant, but extrinsic and unproved, activities of defendants. However, in light of the relatively strong evidence of guilt of deliberate misrepresentation in this case, coupled with the court's curative instructions, we do not believe

that the cumulative effect of these few comments over the course of a three-day trial tainted the proceedings to a degree requiring the grant of a new trial.

Accordingly, for the reasons set forth above, the convictions of appellants are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 78-5752

D. C. Docket No. CR-478-32

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH LICHENSTEIN and LEO BELLA,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the said District Court in this cause be, and the same are hereby, affirmed.

FEBRUARY 1, 1980

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5752

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH LICHENSTEIN and
LEO BELLA,

Defendants-Appellants.

- - - - - -

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING

(March 10, 1980)

Before WISDON, TJOFLAT and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled

and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

U.S. Court of Appeals
FILED
Mar. 10, 1980
Gilbert F. Ganucheau
Clerk

CERTIFICATE OF SERVICE

I do certify that I have this day served true and correct copies of the within and foregoing brief for Appellant upon the following counsel for the Appellee:

Melissa S. Mundell
Assistant U.S. Attorney
Federal Building
Wright Square
Savannah, Georgia 31401

by mailing a copy to said counsel at her office address.

This 9th day of April, 1980.

Attorney for Petitioners